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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS ARTURO CABANILLAS, Defendant and Appellant.	B229804 (Los Angeles County Super. Ct. No. KA091502)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed as modified.

Morgan H. Daly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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In an amended information filed October 20, 2010, appellant Luis Arturo Cabanillas was charged with attempted carjacking (Pen. Code, §§ 664/215, subd. (a), count 1),[1] attempted second degree robbery (§§ 664/211, count 2), and assault with a firearm (§ 245, subd. (a)(2), count 3). Firearm enhancements (§ 12022.53, subd. (b)) were alleged as to counts 1 and 2. As to count 3, it was further alleged that appellant personally used a firearm within the meaning of section 12022.5.

Appellant pled not guilty and denied the special allegations. A jury found appellant guilty on all three counts and found true section 12022.53, subdivision (b) allegations as to all three counts. Using count 1 as the base term, the trial court sentenced appellant to a total of 11 years 6 months in prison, comprised of the low term of 18 months plus a 10-year enhancement for the firearm allegation. The court stayed the sentences in counts 2 and 3, pursuant to section 654.

Appellant contends there was insufficient evidence to support his convictions for attempted robbery and assault. Appellant also contends that the trial court erred in imposing the section 1202.5 fine, and that the abstract of judgment must be corrected to reflect the correct firearm use enhancement on count 3.

We find the imposed crime prevention fine was unauthorized and order it stricken. We direct the trial court to correct the abstract of judgment to reflect a firearm enhancement pursuant to section 12022.5 on count 3. In all other respects, the judgment is affirmed.

STATEMENT OF FACTS

On July 1, 2010, appellant spent the day at the home of his girlfriend Angela, in Covina. Around 11:00 a.m. Angela's next-door neighbor Cody Buczynski showed appellant his father's Remington 12-gauge shotgun. Appellant held the gun which was

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

unloaded. The gun was stored in a brown case and Buczynski placed it in the window sill area of his bedroom.

Around 6:45 p.m. that evening, Buczynski was talking to Angela when appellant's friend, Manuel Perez, came up the driveway. Perez was holding his hand to his face and was "dripping blood." He appeared to be badly injured. Appellant and Buczynski tended to Perez. Appellant was upset because his friend was hurt. While Buczynski removed his shirt and attempted to wrap Perez's wound, he observed appellant running down the driveway. Appellant was carrying the case containing the shotgun and running towards Barranca Avenue. Buczynski and Perez proceeded to follow him.

Salvador Hernandez worked at the meat market on Barranca Avenue and Arrow Highway in the City of Covina. He finished his shift at approximately 7:00 p.m. on July 1, 2010. In the parking lot, Hernandez started his car's engine to warm up the car, and left the keys in the ignition. Appellant approached him, as he was returning to the market, and using a strong tone of voice ordered Hernandez to give him a ride. Hernandez was fearful because appellant was carrying a gun case on his shoulder. Appellant told Hernandez that if Hernandez "didn't give him a ride, he had a gun, and . . . could take [the] car . . . ." Appellant was standing two feet from Hernandez and holding the gun in front of him with both hands. He unzipped the gun case so that Hernandez could see the gun. When the gun fell to the ground Hernandez was scared because appellant looked angry. Hernandez believed that appellant would use the weapon on him. Hernandez told appellant that he could take the car if he wanted it but that Hernandez needed to return to the market because he had promised to give a friend a ride.

By this time Buczynski and Perez had reached the parking lot and were talking to appellant. Appellant did not ask Hernandez to call 9-1-1 or get an ambulance. He did not tell Hernandez that he needed help to take Perez to the hospital. Hernandez went back to the car, turned the ignition off, took the keys with him, and walked back into the store.

At approximately 7:00 p.m. Los Angeles County Deputy Sheriff Ernest Lofton and his partner Deputy Brodie were driving east on Arrow Highway in the City of Covina, in a marked patrol car, when they were contacted by a person in a vehicle who said he saw three males, one of whom was bleeding from the head, while another appeared to be carrying a gun. The officers arrived at the meat market parking lot within a minute. Deputy Lofton observed appellant holding the gun case while standing by the driver's side of Hernandez's vehicle. Appellant looked in the direction of the patrol car, immediately tossed the gun case into the vehicle through the driver's side window and ran across the street. Buczynski and Perez were detained by Deputy Lofton. Deputy Brodie pursued appellant and detained him. Deputy Brodie recovered a Remington 12-gauge shotgun from the vehicle which was operable and unloaded.

On July 2, 2010 at about 6:00 p.m., Los Angeles County Deputy Sheriff Alan Wetters, who was the investigating officer on the case, interviewed appellant. Appellant was advised of his constitutional rights and agreed to talk. Appellant admitted that he told Hernandez that he had a shotgun and demanded a ride from him. Appellant stated that when he saw the patrol car enter the parking lot he panicked and threw the shotgun into the vehicle before fleeing.

DISCUSSSION

I. There is Sufficient Evidence to Sustain Appellant's Conviction for Assault with a Firearm

A. Contention

Appellant contends the evidence is insufficient to support the jury's finding he assaulted Hernandez with a firearm as charged in count 3 because the shotgun was unloaded and he did not strike Hernandez with it.

B. Standard of Review

When determining whether the trial evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th

1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.)

"[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th, 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

So long as the circumstances reasonably justify the trier of fact's finding, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

C. Relevant Authority

"Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269, citing *People v. Williams* (2001) 26 Cal.4th 779, 782.)[2] "'Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, *any other similar act*, accompanied by such circumstances as

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[2] "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

denote an intention existing at the time, coupled with a present ability of *using actual violence* against the person of another, will be considered an assault.' [Citations.]" (*People v. Colantuono* (1994) 7 Cal.4th 206, 219.)

A "threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury. [Citations.]" (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn 6.) Nevertheless, a defendant who uses, or has the present ability to use, an unloaded gun as a club or bludgeon may be convicted of assault with a firearm. (*Ibid.*, see also *People v. Miceli, supra*, 104 Cal.App.4th at p. 270 ["A person may commit an assault under [§ 245, subd. (b)] by using the gun as a club or bludgeon, regardless of whether he could also have fired it in a semiautomatic manner at that moment"].) In other words, nothing in the statute providing for an assault with a firearm requires that the firearm be loaded. (§ 245, subd. (a)(2).)

D. Analysis

The circumstances in which appellant used the shotgun denoted an intent to use it as a club or bludgeon. A jury could reasonably infer that appellant knew the weapon was unloaded because he was shown the gun by Buczynski earlier that morning and allowed to hold it and examine it. Hernandez testified and appellant admitted to Deputy Wetters that when he ordered Hernandez to give him a ride he also told him he had a gun. Appellant kept the gun (inside the case) on his shoulder as he walked down the street to the meat market parking lot and when he first approached Hernandez. It was only when he sought to intimidate Hernandez that he manipulated the shotgun in any way. Tellingly, appellant did not remove the gun and point it at Hernandez as if to shoot because that would have been futile. Instead, appellant approached Hernandez, removed the gun case from his shoulder, unzipped it to reveal the shotgun, and from a distance of two feet held the gun straight up in front of him with both hands. From this evidence, a jury could reasonably conclude that appellant had the present ability and intended to use the gun as a club or a bludgeon if his demands were not met by Hernandez. (See *People*

v. Lipscomb (1993) 17 Cal.App.4th 564, 570 [conditional threat of injury may constitute assault].)

Appellant contends that he did not lift the gun as if to strike Hernandez, swing it at him, or engage in any conduct that might give a reasonable person the impression that his next movement might complete the battery. Hernandez disagrees and testified that appellant was angry and he feared appellant was going to use the weapon on him. Citing *People v. Yslas* (1865) 27 Cal. 630, appellant contends that his actions constituted nothing more than "mere menace" and the necessary violence had not "begun to be executed." (*Id*. at p. 633.) But very few steps remained for appellant to inflict injury. Although not precisely on point, *People v. Thompson* (1949) 93 Cal.App.2d 780 is instructive. There, evidence showed the defendant pointed a revolver toward two sheriff's deputies, aiming between them and pointing the gun downward. The appellate court held that the defendant's actions were sufficient to support his conviction on two counts of assault with a deadly weapon, noting that "[w]hile [the defendant] did not point the gun directly at [the deputies] or either of them, it was in a position to be used instantly." (*Id*. at p. 782.) Similarly here, although appellant did not swing the shotgun in the manner of a bludgeon, by approaching Hernandez, standing just two feet from him, and holding the shotgun in front of him with both hands, he was in position to do so.

II. There is Sufficient Evidence to Sustain Appellant's Conviction for Attempted Robbery

A. Contention

Appellant contends that his conviction for attempted robbery must be reversed because there was insufficient evidence to show that he intended to permanently deprive Hernandez of his vehicle.

B. Relevant Authority

"Robbery is the taking of 'personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by

means of force or fear and with the specific intent permanently to deprive such person of such property.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 464, quoting CALJIC No. 9.40.)[3] The intent to deprive permanently is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of the value or enjoyment. (*People v. Avery* (2002) 27 Cal.4th 49, 58.)

An attempted robbery requires the specific intent to commit robbery and a direct yet ineffectual act that went beyond mere preparation toward its commission. (*People v. Lindberg* (2008) 45 Cal.4th 1, 24.) A defendant's intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207–1208.)

C. Analysis

Appellant approached Hernandez and aware that he had an unloaded gun initially demanded a ride in a strong tone. When Hernandez hesitated, appellant was forced to display the weapon and inform him that he had a gun and he could take the car. Appellant did not tell Hernandez that he only needed the car to take his friend to the hospital or that he would return the car at some point in time. His words and actions demonstrated an intent to "take" rather than "borrow" and a jury could reasonably infer from the evidence that he intended to permanently deprive Hernandez of his vehicle.

Appellant claims that if his intent was to permanently deprive Hernandez of his vehicle he could have done so when Hernandez walked back into the market, leaving the engine running, the windows down, and the doors unlocked. But this contention is contradicted by the evidence. Hernandez testified that while appellant was talking to Buczynski and Perez, he went back to the car, turned the ignition off and took the keys with him before returning to the store.

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[3] "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.)

The case cited by appellant is distinguishable. *People v. Thompson* (1980) 27 Cal.3d 303 addressed a completed taking. There, the defendant admitted taking the car "'to get back down the hill'" and he actually parked the car and left it. (*Id.* at p. 321.) The car was recovered by the police shortly after it was taken and had not been hidden or rendered inoperable. (*Ibid.*) The court held the intent was to temporarily deprive and did not establish the intent necessary for a robbery. (*Ibid.*) Here, on the other hand, appellant did not complete the taking of Hernandez's car and what he may have done with the car is conjecture.

III. The Crime Prevention Fine

At sentencing, the trial court imposed a crime prevention fine of $38 pursuant to section 1202.5. Appellant contends that the imposition of the fine is unauthorized and asks that it be stricken. The People agree with appellant's request. Attempted crimes are not among the enumerated offenses to which section 1202.5 applies. We accept the People's concession, and we will strike the crime prevention fine.

IV. Correction of Abstract of Judgment

The amended information specially alleged appellant personally used a firearm within the meaning of section 12022.53, subdivision (b), in connection with counts 1 and 2 (attempted carjacking and attempted second degree robbery). In connection with count 3 (assault with a firearm) the information alleged a firearm enhancement within the meaning of section 12022.5. The jury verdict form incorrectly stated the firearm enhancement on count 3 was pursuant to section 12022.53, subdivision (b). On count 3, the trial court sentenced appellant to two years plus a three-year enhancement pursuant to section 12022.53, subdivision (b). The abstract of judgment reflects firearm enhancements pursuant to section 12022.53, subdivision (b) on all 3 counts. Appellant contends, and the People agree, that the abstract of appellant's judgment should be modified to reflect the correct firearm use enhancement on count 3.

A court has inherent power to correct clerical errors to make court records reflect the true facts. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) This power exists independently of statute and may be exercised in criminal cases. (*People v. Flores* (1960) 177 Cal.App.2d 610, 613.) The court may correct such errors on its own motion or on the application of the parties. (*In re Candelario, supra*, at p. 705.)

Cases distinguish between clerical error which can be corrected by amendment and judicial error which can only be corrected by appropriate statutory procedure. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808; see also Pen. Code, § 1170, subd. (d).) Generally, a clerical error is one inadvertently made, while a judicial error is one made advertently in the exercise of judgment or discretion. (*In re Candelario, supra*, 3 Cal.3d at p. 705.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*People v. Schultz, supra*, at p. 808 [judge misspoke].)

Here, although the error was judicial, it was inadvertent and not an exercise of judgment or discretion.

During the conference regarding jury instructions the prosecutor stated, "Count 3—because the nature of the charge, it's a 12022.5. But they'll be instructed in the same instruction, just to a different Penal Code section." A discussion took place as to how the verdict form should be worded and the clerk noted the distinction between the firearm enhancements on counts 1 and 2, and that alleged on count 3. Nevertheless, the jury verdict form which was prepared stated all enhancements were within the meaning of section 12022.53, subdivision (b). This was a clerical error.

The jury was properly instructed with CALCRIM No. 3146 "Personally Used Firearm" that set forth allegations that appellant personally used a firearm during the commission of the three offenses. In pronouncing sentence on count 3, the trial court incorrectly stated that the low term on the enhancement under section 12022.53, subdivision (b) was three years, when in fact the low term is 10 years. The court stated, "And I'm going to sentence him to three years which is the low term on the enhancement under 12022.53(b) and stay imposition of that sentence as well." It appears it was the

trial court's intention to impose a section 12022.5 enhancement on count 3 because the low term is three years under that section. The trial judge misspoke.

Since sentence on count 3 was stayed, the clerical error which was followed by inadvertent judicial error was not prejudicial. The abstract of judgment will be corrected.

DISPOSITION

The Superior Court shall direct its clerk to amend the abstract of judgment to reflect: (1) the crime prevention fine pursuant to Penal Code section 1202.5 is stricken; and (2) the firearm enhancement on count 3 should be amended to read pursuant to section 12022.5. The Superior Court shall send the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST